IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 16-0555

ATLANTIC RICHFIELD COMPANY
Petitioner,

v.

MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY, THE HONORABLE KATHERINE M. BIDEGARAY
Respondent,

UNITED STATES' AMICUS BRIEF

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STATEMENT OF THE CASE

On October 5, 2016, this Court granted a writ of supervisory control for the limited purpose of considering the District Court's August 30, 2016 Order in *Christian v. Atlantic Richfield Co.*, DV-08-173 BN (2d Jud. Dist.), and invited the United States Environmental Protection Agency (EPA) to file an *amicus* brief addressing whether the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-75, bars or otherwise prevents a claim for restoration damages under Montana law that a group of 98 landowners has filed against the Atlantic Richfield Company (ARCO). *See* Oct. 5, 2016 Order. As explained below, CERCLA expressly bars the landowners' claim for restoration damages and also preempts that claim. Additionally, any response action that the landowners propose to implement at the Anaconda Superfund Site (Site) would require EPA authorization, which has not been granted.

STATEMENT OF ISSUES

(1) Section 113(h) of CERCLA, 42 U.S.C. § 9613(h), withdraws court jurisdiction "to review any challenges" to EPA-selected CERCLA response actions. EPA has selected response actions for the Site; and the landowners, through their restoration-damages claim, seek to enforce a different soil cleanup level, and would impose new cleanup requirements for soil, and

seek to install underground barriers that may alter groundwater flow, change groundwater chemistry, and otherwise affect groundwater that EPA seeks to monitor and treat. Does section 113(h) of CERCLA bar the landowners' claim for restoration damages because that claim would "challenge" an EPA-selected response action?

(2) Even if section 113(h) did not bar the landowners' claim, if there is a conflict between federal and state cleanup standards, federal law prevails where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The landowners, through their restoration-damages claim, seek a remedy that both conflicts with and undermines the execution of EPA's Records of Decision (RODs). Does CERCLA preempt the landowners' claim for restoration damages where the remedy for that claim would conflict with the response action that EPA selected?

(3) Where a remedial investigation and feasibility study has been undertaken at a CERCLA site, section 122(e)(6) of CERCLA, 42 U.S.C. § 9622(e)(6), prohibits potentially responsible parties from undertaking "any remedial action" unless that action has been authorized by EPA. Potentially responsible parties are defined to include "the owner … of … a facility" or

"any person who at the time of disposal … owned or operated any facility," 42 U.S.C. § 9607(a)(1)-(2). Are the landowners, who own property at the Site, prohibited from undertaking a remedial action without EPA authorization?

STATEMENT OF FACTS

I. History of the Anaconda Smelter Site and EPA Oversight and Enforcement

Nearly 100 years of copper milling and smelting operations in and near Anaconda, Montana, resulted in widespread contamination of soils, surface water, and groundwater. *See Christian v. Atl. Richfield Co.*, 358 P.3d 131, 137-38 ¶¶ 3-7 (Mont. 2015); Record of Decision, Community Soils Operable Unit § 5.0, Sept. 1996 (CSOU ROD);[1] Record of Decision Amendment, Anaconda Regional Water, Waste, and Soils Operable Unit § 2.2, Sept. 2011 (ARWWS OU ROD Am.).[2] The mining activities severely affected about 20,000 acres of soil, polluted millions of gallons of groundwater, and produced large amounts of slag, tailings, and flue dust. Record of Decision Amendment, Community Soils Operable Unit § 2.1, Sept.

[1] The CSOU ROD is available at http://goo.gl/2qIDwM.

[2] The ARWWS OU ROD Am. is available at http://semspub.epa.gov/src/document/08/1211311.

2013 (CSOU ROD Am.).[3] The primary contaminants of concern are arsenic, cadmium, copper, lead, and zinc. *Id.*

EPA has been actively responding to hazardous-substance contamination at the Site for more than 30 years. *See generally* U.S. EPA, Fifth Five-Year Review: Anaconda Smelter Superfund Site (Sept. 25, 2015), at ES-1, https://semspub.epa.gov/src/document/08/1549381. ARCO has implemented response actions to address contamination on more than 340 residential properties and more than 11,500 acres of open space. *Id.* Significant work remains, however, including cleanup of an additional 1,150 residential yards, revegetation of 7,000 acres of upland soils, and removal and closure of waste areas, stream banks, and railroad beds. Final Residential Soils Report, August 7, 2015, available at https://semspub.epa.gov/src/document/08/1549208; Fifth Five-Year Review, Table 10-1 at 10-7. EPA estimates that ARCO will complete this work by approximately 2025, though monitoring and maintenance work will continue indefinitely. Fifth Five-Year Review, Table 10-7 at 10-58.

EPA and the Montana Department of Health and Environmental Sciences (now the Montana Department of Environmental Quality, or MDEQ) began negotiating with ARCO in 1982 to clean up the Site, including extensive

[3] The CSOU ROD Am. is available at http://semspub.epa.gov/src/document/08/1280693.

investigations prior to developing final cleanup plans. These investigations involved characterizing soils, surface water, groundwater, and solid wastes across the entire Site, to delineate contamination. CSOU ROD Am. Part II §§ 2.1, 8.0; *see also* ARWWS OU ROD Am. §§ 1.5, 2.1.

Based on those investigations, EPA divided the Site into five Operable Units (OUs), each of which relates to a different medium (such as soils or groundwater) or geographic area. *See* Fifth Five-Year Review Report at ES-1 – ES-2. EPA response actions at two OUs directly impact the landowners' property: Community Soils (CSOU), which primarily addresses residential yards contaminated with arsenic and lead in Anaconda, Opportunity, and the surrounding area; and Anaconda Regional Water, Waste, and Soils (ARWWS OU), which addresses a variety of soil, surface water, and groundwater contamination issues throughout the Site. *See generally* CSOU ROD; *see also* Record of Decision, ARWWS OU, Sept. 1998 (ARWWS OU ROD).[4] The CSOU and ARWWS OU RODs, and the two accompanying amendments to these RODs, total more than 1,300 pages and provide a detailed explanation of the science and engineering necessary to implement aspects of the cleanup. These planning documents,

[4] The ARWWS OU ROD is available at http://goo.gl/DWz1pF.

including the supporting remedial investigation and feasibility studies, cost tens of millions of dollars to develop.

EPA issued the CSOU ROD in 1996 and the ARWWS OU ROD in 1998. As required under sections 113(k) and 117 of CERCLA, 42 U.S.C. §§ 9613(k) & 9617, and regulations that EPA promulgated thereunder, 40 C.F.R. §§ 300.430(c), (f)(3), 300.435(c), EPA sought public comment before selecting the remedies. Both RODs and their amendments provide for continued monitoring and sampling and allow EPA to refine its selected remedy. ARWWS OU ROD §§ 9.6, 9.7; ARWWS OU ROD Am. § 6.4.5.

The CSOU cleanup is ongoing. Based on extensive evidence and explanation, the CSOU ROD establishes an action level of 250 parts per million (ppm) for arsenic in residential yards and requires removal and replacement of up to 18 inches of soil in yards testing above that level. CSOU ROD §§ 4.0, 9.1. The excavated soil must be placed at an EPA-approved on-site soil management area. CSOU ROD Am. § 6.1. The CSOU ROD also requires implementing institutional controls (legal requirements minimizing human exposure) and educating residents regarding potential exposure risks. CSOU ROD § 9.1. EPA amended the CSOU ROD, with MDEQ's concurrence, in September 2013. The amendment added a component for lead remediation, requiring cleanup of residential yards with lead

concentrations above 400 ppm to a depth of 12 inches, added cleanup levels for arsenic and lead in accessible interior dust, and expanded institutional controls. *Id.* Part I.

The ARWWS OU ROD originally established an arsenic action level of 18 parts per billion (ppb) for groundwater and surface water, ARWWS OU ROD § 6.1, which was lowered in a September 2011 ROD amendment to 10 ppb, consistent with updated federal and state standards. ARWWS OU ROD Am. § 3.1. EPA and MDEQ further determined that it was technically impracticable to restore contaminated groundwater in the South Opportunity alluvial aquifers that are the focus of the landowners' claims, and instead decided to implement source-control measures and a domestic-well monitoring and treatment program. The agencies also require ongoing water-quality monitoring to determine whether additional remedial action may be necessary in the future. ARWWS OU ROD Am. § 6.4.5.

EPA considered construction of an underground Permeable Reactive Barrier (PRB), similar to the barrier proposed by the landowners, along Willow Creek for collecting and treating groundwater south of Opportunity to protect surface water in Willow Creek to the south and east of Opportunity. ARWWS OU ROD Am. § 6.4.2.1; ARWWS OU ROD Am. Responsiveness Summary § 3.0. EPA concluded, however, that this approach would not necessarily achieve the human health

standard in Willow Creek and would not eliminate exceedances of arsenic in downstream receiving waters. *Id.* § 6.4.3.1 & Responsiveness Summary § 3.0. EPA also determined that it was technically impracticable to reduce arsenic concentrations below 10 ppb in shallow groundwater in the South Opportunity aquifer, because of widespread arsenic contamination in both surface and groundwater from contaminated soil and seasonally saturated conditions. *Id.* § 6.4.1. EPA therefore did not select below-ground structures to address groundwater arsenic concentrations.

II. The Landowners' Proposed Restoration Plan

The landowners seek recovery of, among other things, "restoration damages." 3d Am. Compl. ¶ 43(E). Under Montana law, restoration damages redress an injury to property, and may exceed the diminution in market value of property caused by the particular injury. *See Lampi v. Speed*, 261 P.3d 1000, 1004 ¶ 21 (Mont. 2011); *see also Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1086-88 ¶¶ 28-31, 38 (Mont. 2007). To prevent a windfall, Montana requires a plaintiff asserting a claim for restoration damages to show that any award of such damages will actually be used to abate the injury. *Sunburst*, ¶ 40-43; *Lampi*, ¶ 31.

The landowners submitted reports from two experts in support of their restoration-damages claim. Dr. Richard Pleus opined that EPA's selection of a 250 ppm residential-soil action level for arsenic should be lowered to 8 ppm. Pleus Report iv-v, 57 (Apr. 12, 2013); *see also* Pleus Addendum at iv, 2-4.

Another expert, John Kane, set out a scope of work and estimated costs for soil and groundwater restoration. Expert Report of John R. Kane (Apr. 13, 2013) ("Kane Rep."). His residential-soil remediation recommendation provides for removing the upper two feet of soil (totaling approximately 430,000 cubic yards or 650,000 tons), transporting it to Spokane for disposal, and replacing it with clean fill. Kane Rep. 10.[5] Kane also proposes installing an 8,000-foot long, 15-foot deep, and 3-foot wide underground PRB wall up-gradient of Opportunity, as well as shorter walls "up-gradient of Crackerville properties," to address groundwater. *Id.* at 11. Kane originally estimated that the soil removal would take 20 months and installation of the PRB walls four to six months, at a total cost of approximately $101 million. *Id.* at 11, Table 1. He updated his estimates in a May 2, 2016 letter and through additional supplemental disclosures, revising the estimated soil tonnage to be excavated and added costs associated with project

[5] In a more recent addendum, Kane indicates that fill must be hauled to Missoula rather than Spokane, and that local deposition may be possible. Kane May 2, 2016 Supp. Disclosure.

oversight ranging from $38 million to $50 million, depending on the volume of contaminated soil to be deposited locally, rather than in Spokane or Missoula. Kane May 2 Rep. at 5; Kane Sept. 2014 Supp. Disclosure.

STANDARD OF REVIEW

EPA adopts the Standard of Review set out in Petitioner's brief.

SUMMARY OF ARGUMENT

When Congress passed CERCLA, it narrowly circumscribed when and how to challenge an EPA-selected remedy and provided EPA with authority to review and approve remedial actions undertaken by potentially responsible parties. It did this to ensure that contaminated sites are cleaned up efficiently and without delay.

Specifically, CERCLA section 113(h) expressly bars "any challenges" to a removal or remedial action selected under CERCLA section 104. *See* 42 U.S.C. §§ 9604, 9613. The landowners' restoration-damages claim challenges EPA's selected response actions at the Site because the landowners would require different cleanup standards and actions for soil cleanup, and require installation of underground groundwater barriers, which could undermine EPA's cleanup approaches. Section 113(h) prohibits this claim because it would impose different response actions than those selected by EPA.

Additionally, the doctrine of conflict preemption independently bars ARCO's restoration-damages remedy. Congress delegated the President authority to set cleanup levels and select response actions. Implementing the landowners' restoration-damages remedy would undermine Congress's approach, and aspects of the landowners' proposed remedy conflict with EPA's response action. Because Congress intended to supersede these types of non-federal remedies, the doctrine of conflict preemption bars the landowners' proposed cleanup.

CERCLA section 122(e)(6), 42 U.S.C. § 9622(e)(6), requires EPA authorization of any remedial action at a cleanup site by potentially responsible parties where EPA has already initiated a remedial investigation and feasibility study. The landowners own property at the Site, and the District Court did not properly assess whether the landowners are "potentially responsible parties" under CERCLA. It is likely that some, if not all, of the landowners are potentially responsible parties. No landowner has sought EPA approval to undertake any remedial action at the Site. EPA is unlikely to approve the landowners' approach, and no court should assume that the landowners' proposed remedy could be implemented. Thus, the landowners' proposed remedy is not a reliable basis for an award of restoration damages.

The landowners' claim for restoration damages, which under Montana law would require landowners to use damages to abate the injury in a manner inconsistent with EPA's selected remedy, is exactly the type of challenge Congress intended to prevent.

ARGUMENT

As authorized by CERCLA, EPA has selected response actions at the Site. Over the course of more than three decades, EPA has invested millions of dollars in agency resources and thousands of hours of employee time, and has required ARCO to spend hundreds of millions more characterizing the Site, developing RODs, and cleaning the Site. EPA's RODs and ROD amendments exceed 2,000 pages, and the remedy-selection process is dynamic and continues to respond to public concerns and new data. For example, EPA significantly amended the RODs in 2011 and 2013 based on new information. The remedy-selection and implementation processes account for a wide range of technical, scientific, and community concerns. EPA is actively implementing those processes at the Site.

Congress enacted CERCLA to provide a framework for cleanup of the most contaminated hazardous-waste sites in our nation. The statute's goal is to protect public health and the environment from the release of hazardous substances.[6]

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[6] *See* 40 CFR § 300.430; *see also Voluntary Purchasing Grps., Inc. v. Reilly*, 889 F.2d 1380, 1386 (5th Cir. 1989); *O'Neil v. Picillo*, 682 F. Supp. 706, 726 (D.R.I.

Given the number of people and the wide range of interests impacted by the cleanup of large-scale contamination, EPA understands that people may disagree over its final remedy decision. However, EPA's responsibility is to protect human health and the environment based on sound science. It is vital that cleanups proceed expeditiously once EPA selects a remedy. Congress was concerned that consideration of the same broad interests that make for a robust remedy-selection process should not work to prevent EPA's selected remedy from moving forward once EPA selects a cleanup plan.

Congress included statutory provisions such as CERCLA's section 113(h), 42 U.S.C. § 9613(h), and section 122(e), 42 U.S.C. § 9622(e), to ensure that an EPA-selected cleanup moves forward without obstruction, delay, and the diversion of resources accompanying judicial challenge and litigation-based additional cleanup requirements and expenses. Congress has made it abundantly clear that only EPA has authority to establish both the cleanup levels and the response actions required to achieve those cleanup levels at a Superfund site. No matter how well intentioned, any attempt to impose conflicting cleanup standards and response actions is prohibited by CERCLA.

1988), *aff'd*, 883 F.2d 176 (1st Cir. 1989); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 n.7 (2d Cir. 1985).

I. Section 113(h) of CERCLA Prohibits the Landowners' Claim for Restoration Damages.

CERCLA bars any claim for restoration damages that constitutes a "challenge" to EPA's ROD. *See id.* § 9613(h). The Ninth Circuit has found this language to be "clear and unequivocal," and "amount[ing] to a blunt withdrawal of … jurisdiction" for "any challenges" to an ongoing CERCLA response action, including any attempt to interfere with, strengthen, or control the cleanup or remedy. *McClellan Ecological Seepage Situation*, 47 F.3d 325, 328 (9th Cir. 1995) (internal citations omitted). Here, the landowners' claim for restoration damages poses a prohibited challenge because it would (1) impose more stringent cleanup levels, (2) impose additional requirements, and (3) require approaches to groundwater remediation and soil disposal that directly conflict with EPA's ROD.

A. The Landowners' Restoration Damages Claim Is an Impermissible Challenge to EPA's Ongoing Cleanup of the Anaconda Smelter Site.

The section 113(h) bar applies to any claims that in their effect "challenge[] any removal or remedial action selected under section 9604 of this title" or seek "to review any order under section 9606(a) of this title." 42 U.S.C. § 9613(h). In enacting CERCLA, Congress made an affirmative choice to prioritize the expeditious cleanup of hazardous substances and to ensure that litigation would not interfere with such cleanup actions.

The District Court here held that the restoration-damages claim could proceed to trial because a claim challenges EPA's cleanup "*only* if the relief sought alters the ROD or terminates or delays the EPA-mandated cleanup." August 30 Slip Op. at 9 (emphasis added) (citing *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1115 (9th Cir. 2000)). This holding is erroneous, mischaracterizes Ninth Circuit law, and reflects an overly narrow view of section 113(h). In the case cited by the District Court, *ARCO Environmental Remediation*, the Ninth Circuit held only that a claim regarding the right to access public information about a cleanup was not a "challenge" because that claim was not, in any way, related to the goals of the challenged cleanup. *Id.* The Ninth Circuit did not hold that termination or delay was *necessary* to trigger section 113(h). Rather, it recognized, in dicta, that termination or delay of an EPA-mandated cleanup was *sufficient* to trigger the section 113(h) bar.[7] *See* 213 F.3d at 1115.

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[7] Section 113(h) states that "[n]o Federal court shall have jurisdiction ... under State law ... to review any challenges to removal or remedial action ...." 42 U.S.C. § 9613(h) (emphasis added). The landowners did not argue in district court that section 113(h) is inapplicable to state courts, but state courts, like federal courts, lack subject matter jurisdiction to decide claims like the landowners' restoration damages claim. CERCLA section 113(b) gives "the United States district courts" "exclusive original jurisdiction over all controversies arising under [CERCLA] ...." *Id.* § 9613(b) (emphasis added). The Ninth Circuit has explained

The District Court should have dismissed the restoration-damages claim because section 113(h) bars claims that challenge an EPA cleanup. Most courts have correctly concluded that any suit that will "impact the implementation" of the government's selected CERCLA response action constitutes a "challenge" within the meaning of section 113(h). *See Schalk v. Reilly*, 900 F.2d 1091, 1094 (7th Cir. 1990). While Congress did not intend to bar all state-law claims related to hazardous substances, *see New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1243-44 (10th Cir. 2006) (citing cases), many courts have correctly found that Congress did intend to bar attempts to apply *any* law that even indirectly works to control, alter, or interfere with an EPA-selected remedy, or that otherwise affects the goal of the remedy. *See McClellan*, 47 F.3d at 330. Even claims that purport to strengthen EPA's selected remedy are barred. *Id.* (holding that a claim challenges a CERCLA cleanup under section 113(h) if it "interfere[s] with the remedial actions selected

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that section 113(h) speaks in terms of actions brought in federal courts because Congress required CERCLA controversies be litigated in federal courts. *See Fort Ord Toxics Project, Inc. v. Cal. EPA*, 189 F.3d 828, 832 (9th Cir. 1999) ("We believe Congress only removed federal court jurisdiction from 'challenges' to CERCLA cleanups because only federal courts shall have jurisdiction to adjudicate a 'challenge' to a CERCLA cleanup in the first place."); *see also O'Neal v. Dep't of the Army*, 742 A.2d 1095, 1100-01 (Pa. Super. Ct. 1999) ("[T]he present claim against the United States must be pursued in strict accordance with the waiver of sovereign immunity; that waiver is found in CERCLA and CERCLA limits jurisdiction to the United States district courts.").

under CERCLA," "seeks to improve on the remedial actions selected under CERCLA section 104," or "seeks to improve on the CERCLA cleanup"); *see also United States v. City & County of Denver*, 100 F.3d 1509, 1513-14 (10th Cir. 1996) (recognizing that Denver's attempts to impose zoning requirements that conflict with EPA cleanup are barred by CERCLA); *Town of Acton v. W.R. Grace Co.*, No. 13–12376–DPW, 2014 WL 7721850 (D. Mass. Sep. 22, 2014) (rejecting attempt to impose additional municipal groundwater cleanup standards).

A "challenge" includes actions that are "related to the goals of the cleanup." *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 239 (9th Cir. 1995). Courts have even barred claims seeking to enforce other federal laws and state laws that attempt to supplement EPA's CERCLA remedy. *See, e.g., Diamond X Ranch, LLC v. Atl. Richfield Co.*, 51 F. Supp. 3d 1015, 1021 (D. Nev. 2014) (barring claims seeking to compel compliance with the Clean Water Act and Nevada's Water Pollution Control Act). The Ninth Circuit has made clear that the prohibition of section 113(h) applies equally to both federal and state actions because "Congress did not intend to preclude dilatory litigation in federal courts but allow such litigation in state courts." *Fort Ord*, 189 F.3d at 832; *see also ARCO Envtl. Remediation, LLC*, 213 F.3d at 1115; *McClellan*, 47 F.3d at 328; 42 U.S.C. § 9613(b) (providing that

the federal courts "shall have exclusive original jurisdiction over all controversies arising under" CERCLA).

In *McClellan,* the Ninth Circuit ruled that a suit seeking to impose additional reporting requirements would "second-guess" EPA's determination and interfere with the remedial action selected, and was accordingly barred by section 113(h). 47 F.3d at 329-30. While recognizing that "every action that increases the cost of a cleanup or diverts resources or personnel from it does not thereby become a 'challenge' to the cleanup," the court concluded that the plaintiffs' desired remedy was "directly related to the goals of the cleanup itself" and effectively sought "to improve on the CERCLA cleanup," thereby constituting a challenge to the cleanup. *Id.* at 330. Similarly, in *Razore*, the court held that section 113(h) barred the plaintiffs' claims regarding EPA's cleanup of a former landfill, which amounted to an "attempt to dictate specific remedial actions and to alter the method and order for cleanup." 66 F.3d at 239-40; *see also Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220-23 (9th Cir. 2013) (barring a citizen suit seeking penalties for past noncompliance with withdrawn unilateral administrative order in ongoing cleanup); *Hanford Downwinders Coal., Inc. v. Dowdle*, 71 F.3d 1469, 1482 (9th Cir. 1995) (holding that health assessment activities at NPL site were protected by section 113(h), and barring claim that defendants had a duty to initiate a health-

surveillance program); *Beck v. Atl. Richfield Co.*, 62 F.3d 1240, 1243 (9th Cir. 1995) (holding that action for compensatory damages but not injunctive relief could go forward, because "resolution of the damage claim would not involve altering the terms of the cleanup order"); *ARCO Envtl. Remediation, LLC*, 213 F.3d at 1115 (summarizing the court's prior holdings under section 113(h)); *Villegas v. United States*, 926 F. Supp. 2d 1185, 1196 (E.D. Wash. 2013) ("CERCLA's broad jurisdictional bar applies to any suit that challenges any aspect of a CERCLA removal or remediation action, regardless of whether the suit purports to be based on CERCLA.").

Other circuits have reached similar holdings. The Tenth Circuit held that a state public-nuisance and negligence suit seeking an unrestricted award of money damages was barred by section 113(h). *New Mexico*, 467 F.3d at 1249-50. The court pointed out that the money damages "would be available only to restore or replace the injured natural resource," much as the landowners' desired restoration-damages award must be used to restore their property as a matter of Montana law, and would necessarily "substitute a federal court's judgment for the authorized judgment of both the EPA and [the State]." *Id.*; *see also Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1073 (11th Cir. 2002) (holding that a suit seeking relocation of residents constituted a challenge to a CERCLA cleanup);

Cannon v. Gates, 538 F.3d 1328, 1335-36 (10th Cir. 2008) (barring a suit seeking injunctive relief ordering remediation of plaintiffs' property).

The District Court incorrectly distinguished the Tenth Circuit's decision by drawing a distinction between common-law and statutory claims. Aug. 30 Slip Op. at 10. But CERCLA section 113(h) does not focus on the nature of the underlying cause of action. Rather, it requires courts to assess the impact of the non-federal remedy (here, the restoration-damages claim) to determine if that remedy poses a prohibited "challenge." *See* 42 U.S.C. § 9613(h). *New Mexico*, along with *McClellan*, *Razore*, and the other cases cited above, shows how courts have assessed what constitutes a prohibited challenge. There is no doubt that many common-law claims survive, as indicated by the legislative history cited by the District Court. Aug. 30 Slip Op. at 13-14. For example, state-law claims for personal injury or diminution in value of property may not amount to a challenge to EPA's response action. The express statutory language of CERCLA, however, makes clear that no claim survives if it seeks to challenge or has the effect of challenging EPA's ROD.

These readings of the scope of section 113(h) are dictated by the broad language used by Congress. Congress emphatically barred "*any* challenges to removal or remedial action … in *any* action," 42 U.S.C. § 9613(h) (emphasis

added); and the United States Supreme Court recognizes the comprehensive scope of the term "any." *See United States v. Gonzales,* 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"); *see also United States v. James,* 478 U.S. 597, 605 (1986) ("Congress' choice of the language '*any* damage' and 'liability of *any* kind' further undercuts a narrow construction" (emphasis in original)). The sweeping nature of Congress's word choice supports a broad reading of the language of section 113(h).

Legislative history also supports a broad reading of section 113(h). The Chairman of the Senate Judiciary Committee explained:

> The timing of review section is intended to be comprehensive. It covers all lawsuits, under any authority, concerning the actions that are performed by EPA. The section covers all issues that could be construed as a challenge to the response, and limits those challenges to the opportunities specifically set forth in the section.

132 Cong. Rec. S14929 (daily ed. Oct. 3, 1986). Such an intent to prohibit review of "all lawsuits" under "any authority," and to cover "all issues," supports the conclusion that section 113(h) bars the landowners' challenge to EPA's ROD.

Finally, actions challenging EPA cleanups would discourage the type of final settlements that Congress sought to foster in enacting CERCLA. *See* 42 U.S.C. § 9622 (describing various types of agreements EPA may enter with liable

parties); *see also Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 971 (9th Cir. 2013) ("Congress sought through CERCLA … to encourage settlements that would reduce the inefficient expenditure of public funds on lengthy litigation.") (quoting *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 119 (2d Cir. 1992)). The main incentive for a responsible party to enter into a CERCLA consent decree with the United States is to fix the party's cleanup obligations. Parties have less incentive to settle if they are subject to potentially conflicting or additional cleanup obligations.

Importantly, Congress also provided mechanisms to challenge EPA's ROD. Those mechanisms are listed in section 113(h). For example, if the landowners believe that EPA's remedy is not sufficiently protective, they may bring a citizen suit under 42 U.S.C. § 9659. *See id.* § 9613(h)(4). By barring litigation that challenges a cleanup plan, section 113(h) ensures that EPA, state agencies, and potentially responsible parties participating in a cleanup can develop and implement an adequate and fully realized cleanup plan. Accordingly, this Court should rule that section 113(h) prohibits the landowners' restoration-damages claim because it challenges EPA's response-action decisions.

B. As a Factual and Practical Matter, Implementing the Landowners' Remedy Will Undermine EPA's Ability to Implement Its Own Remedy.

In the prior section, we address law surrounding the nature of a "challenge" under section 113(h). Here, we focus on how the landowners' claim impacts EPA's remedy at the Site. Under Montana law, the landowners must use any restoration-damages award to restore the affected properties. It follows that obtaining restoration damages under state law necessarily means implementing a cleanup action different from the one selected by EPA. The landowners' experts take issue with the cleanup standards selected by EPA, seeking to apply a soil action level of 8 ppm for arsenic rather than the 250 ppm level set by EPA. The landowners' experts also proposed actions that differ from those EPA has required, including: (1) excavating to two feet rather than EPA's chosen depth of 18 inches within residential areas; (2) transporting the excavated soil to Missoula or Spokane rather than to local repositories, as required by EPA; and (3) constructing a series of underground trenches and barriers for capturing and treating shallow groundwater. The landowners' experts' reports are not detailed, but do indicate that aspects of those plans are a dramatic departure from EPA's ROD requirements. Given the ongoing cleanup at the Site, the landowners bear the burden of showing consistency with section 113(h)—any missing details weigh in favor of dismissing the landowners' claim.

The District Court, disregarding the 1150 properties that remain to be cleaned, appeared to rely heavily on ARCO's representation that the cleanup of the landowners' residential yards will be finished by November 1, 2016, to support its conclusion that the landowners' supplemental restoration requirements will not interfere with ongoing ROD requirements. Aug. 30 Slip Op. at 8. The District Court's conclusion ignores the full impact of permitting the restoration claim to go forward. Allowing individual property owners to divert cleanup resources from the implementation of EPA's ROD during the course of an active cleanup is a direct conflict with EPA's cleanup process. The remediation goals of the CSOU ROD, for example, include minimization of dust transfer, bioavailablity of lead, and soil ingestion. CSOU ROD Am. at II-11. Once the EPA remedy at the landowners' properties is complete, the completed yards are either capped or backfilled with clean soil. *See, e.g.*, CSOU ROD Am. II-18 – II-19 (setting residential-soils requirements including a "soil swap" and ensuring "replacement with clean soil and a vegetative … or other protective barrier"). Tearing up that protective cap or layer of soil directly impacts EPA's chosen remedy and could expose the neighborhood to an increased risk of dust transfer or contaminant ingestion. Offsite disposal of excavated soil would also increase the risk of dust transfer or contaminant ingestion, as well as the safety of the traveling public.

Even if the landowners attempt to coordinate their efforts with EPA, their involvement would slow the implementation and timeline of EPA's ROD and increase the agency's costs. The District Court's analysis wrongly assumed that the restoration on the Site proposed by the landowners' experts could proceed without risk or consequence. *See* Aug. 30 Slip Op. at 8. Additionally, even if EPA could coordinate with the landowners, recognizing this claim could lead to more claims affecting hundreds of thousands of additional contaminated acres.

The landowners' proposal to install underground reactive barriers is plainly inconsistent with EPA's cleanup, and may pose even greater risks. First, it is important to understand that water from domestic wells in the town of Opportunity is generally clean and drinkable, according to EPA's findings. ARWWS ROD Am. at 6.4.1, page 41. However, hydraulic controls (a drain-tile system) intercept arsenic contamination in shallow groundwater beneath the town of Opportunity. *Id.* EPA has concluded that the natural conditions in the underground aquifer, combined with the existing hydraulic controls, are currently protecting Opportunity's groundwater. ARWWS ROD Am. at 6.4.1. If conditions change, EPA can take additional actions that it deems appropriate to protect human health and the environment based on what it learns through monitoring. ARWWS ROD Am. at 6.4.5.

By contrast, the landowners would build several underground permeable reactive barriers. Kane Rep., Opinion 4(b), at 10. These barriers, intended to treat shallow groundwater moving toward Opportunity, would be 8,000 feet long, 15 feet deep, three feet wide, and situated upgradient of the town. *Id.* And shorter barriers would be placed upgradient of individual landowners' properties. *Id.* These barriers could change the groundwater flow in unpredictable ways, which could impact current hydraulic controls, including the functioning of existing upgradient drain tiles that keep Opportunity dry. The barriers proposed by the landowners' experts contain elements and enzymes that supposedly strip arsenic in water but could unintentionally contaminate groundwater and surface water. *Id.* In other words, the landowners' remedy could upset a balance that currently protects human health and the environment. Additionally, if EPA sampling detects elevated contamination following landowners' installation of underwater barriers, EPA will not be able to determine whether the contamination was impacted by the landowners' project, complicating potential remedial options. This situation would become even more complex if other property owners later filed similar claims and demanded construction of additional structures not envisioned by the ROD. Congress's approach, requiring one coordinated cleanup, helps ensure a protective remedy, minimizes these types of risks, and avoids *ad hoc* addition of potentially

competing cleanup measures. The District Court took far too narrow a view of the impact of the scope of a prohibited challenge—looking primarily to whether the landowners "seek to alter the ROD" or "change any of the requirements that the EPA has imposed upon ARCO." August 30 Slip Op. at 9.

CERCLA cleanups are often iterative in that EPA uses data obtained during the remedial investigation and early monitoring to inform subsequent adjustments to its cleanup plan. *E.g.*, CSOU ROD Am. Part II § 3.0 (describing how data obtained through sampling implemented under the original CSOU ROD led EPA to add lead remediation to its soil cleanup). Lawsuits that seek to impose different or additional remedial actions while a cleanup is in progress not only would result in diversion of limited government resources and delay of EPA's cleanup efforts contrary to Congress's intent, *McClellan*, 47 F.3d at 329, but also would force the parties to litigate the details of a cleanup plan that may not be final. Such lawsuits would also invite courts to substitute an *ad hoc* determination as to what constitutes a proper cleanup rather than deferring to EPA's technical judgment.

Not only would the landowners set a new remedial goal for soils (8 ppb for arsenic, compared to the 250 ppb ROD standard), they would achieve their goals through different methods. As in *McClellan*, the landowners' experts advocate remediation levels that are "directly related to the goals" and methods of the

cleanup of the Site prescribed by EPA. Section 113(h), however, does not allow the landowners to use their state-court lawsuit to supplement EPA's selected response-action cleanup levels.

C. Section 113(h) Bars the Landowners' Restoration-Damages Claim Irrespective of CERCLA's Savings Clauses.

The District Court relied on CERCLA's savings clauses in holding that section 113(h) did not bar the landowners' restoration-damages claim. Aug. 30 Slip Op. at 5-8. EPA agrees that CERCLA does not bar all of the landowners' common-law claims. No savings clause, however, shields the landowners' restoration-damages claim. Section 302(d) of CERCLA, which provides in part that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants," 42 U.S.C. § 9652(d), is not in conflict with section 113(h). As the Ninth Circuit stated in *Razore*, "[t]he temporary bar to citizen enforcement does not change [a potentially responsible party's] 'obligations or liabilities'" under other statutes. 66 F.3d at 240. Moreover, reading section 302(d) to govern the interpretation of section 113(h) "would effectively write [section 113(h)] out of the Act," a result that would be contrary to the court's "duty to give effect, if possible, to every clause and word of a statute." *Id.* (alteration in original) (citations

omitted). As the Seventh Circuit has pointed out, while "federal environmental laws [were] not intended to wipe out the common law of nuisance," section 302(d) "must not be used to gut provisions of CERCLA." *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998).

Two other provisions of CERCLA, sections 114(a) and 310(h), also contain savings provisions, but neither provision trumps the limitations Congress set out in section 113(h). 42 U.S.C. §§ 9614(k), 9659(h). Section 310(h) provides that the statute "does not affect or otherwise impair the rights of any person under Federal, State, or common law, *except with respect to the timing of review as provided in section [113(h)] of this title.*" 42 U.S.C. § 9659(h) (emphasis added). The express language of this savings clause demonstrates the primacy of section 113(h). *See Anacostia Riverkeeper v. Wash. Gas Light Co.*, 892 F. Supp. 2d 161, 171 (D.D.C. 2012). Section 114(a) likewise contains no language that would overcome the limitations Congress set out in section 113(h). This case presents a perfect example of how these provisions interrelate. CERCLA does not bar all of the landowners' state-law claims. Only the landowners' claim for restoration damages, to pay for response action above and beyond EPA's selected remedy, is currently barred by CERCLA (and is not saved by any of CERCLA's various savings provisions).

II. Principles of Conflict Preemption Independently Bar the Landowners' Restoration-Damages Remedy.

If there is a conflict between federal and state cleanup standards, federal law prevails where it is "a physical impossibility" to comply with both the federal and state mandates, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Where state action conflicts with a CERCLA cleanup, state cleanup standards are preempted. *See City & County of Denver*, 100 F.3d at 1512-14 (holding that a municipal ordinance imposing a fee on EPA's selected remedy conflicts with a CERCLA cleanup). Even if section 113(h) did not bar the landowners' restoration damages claim, the doctrine of conflict preemption, grounded in the Supremacy Clause, U.S. Const. art. VI, cl. 2, independently bars the landowners'' restoration-damages remedy here. *See generally Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1594-95 (2015).

In conducting a preemption analysis, two bedrock principles guide the courts: (1) the purpose of Congress; and (2) "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Nation v. City of Glendale*, 804 F.3d

1292, 1298 (9th Cir. 2015) (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). Congress, in CERCLA, established how EPA should determine the degree of cleanup at a site, including how EPA should consider non-federal standards (such as state standards) in selecting the final cleanup level. *See* 42 U.S.C. § 9621(d). Congress was clear that the President or his delegates were responsible for remedy selection, after considering state-law cleanup standards and a host of other factors. *See id.* § 9621(a). Allowing the landowners' restoration-damages claim to proceed cannot be reconciled with that congressionally mandated approach for consideration of state and local requirements.

Aspects of the landowners' restoration plan also conflict with EPA's RODs or could make those remedies difficult or impossible to achieve, as discussed more fully in argument section I-B. For example, the landowners' proposed construction of a series of underground barriers could divert groundwater in several areas of concern, which are subject to ongoing groundwater-monitoring efforts under EPA's selected cleanup plan. Additionally, the same excavated soil cannot be transported to EPA-approved onsite repositories, as provided for in the CSOU ROD, and also be transported to Missoula or Spokane, as required in the

landowners' restoration plan.[8] This is the type of uncoordinated response that CERCLA section 121(d), 42 U.S.C. § 9621(d), was designed to prevent. Because Congress has spoken on this point, and clearly intended to supersede non-federal supplemental or additional remedies in the narrow instances presented in this case, conflict preemption is appropriate here.

III. Even if Plaintiffs' Claims Were Otherwise Permissible, the Relief They Seek May Be Barred Under CERCLA Section 122(e)(6).

To ensure that remedial actions are selected and conducted consistent with CERCLA's requirements, Congress declared that no "potentially responsible party," or PRP, may undertake *any* remedial action at a facility where a CERCLA remedial investigation and feasibility study (RI/FS) has been initiated, unless authorized by EPA. As Congress provided in section 122(e)(6) of CERCLA:

> When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by [EPA].

42 U.S.C. § 9622(e)(6). As outlined above, the President has initiated an RI/FS for the Anaconda Smelter Site under CERCLA, through EPA securing ARCO's

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[8] Even if the landowners deposit excavated soil in onsite repositories, that approach would unexpectedly increase soil volume and would create additional costs for EPA's cleanup.

agreement to perform the RI/FS for the various operable units within the Site. Consequently, no PRP may undertake any remedial action at the Site without EPA authorization. *See id.* § 9622(e)(6). EPA has not authorized the remedial action the landowners appear to seek in their restoration-damages claim, and therefore neither ARCO nor any landowner PRP may undertake it. Though the landowners seek money damages, those damages presuppose a subsequent remedy that is unauthorized.

CERCLA designates current owners of contaminated property as PRPs, *see* 42 U.S.C. § 9607(a)(1), unless they meet certain requirements, *see id.* § 9607(q). The District Court improperly concluded that the landowners need to be somehow "declared PRPs" to be considered a potentially responsible party. Aug. 30 Slip Op. at 15. That conclusion is incorrect, and is untethered to the statutory language. Parties that meet the requirements set out in 42 U.S.C. § 9607(a)(1) are, by definition, potentially responsible parties—regardless of whether they have defenses that could absolve them of liability. Most relevant here are the so-called "third party" and "innocent landowner" defenses, by which a PRP may show that the release of hazardous substances was caused solely by "an act or omission of a third party," *id.* § 9607(b)(3), or that "the disposal or placement of the hazardous substance" occurred before the PRP acquired the property, *id.* § 9601(35)(A).

However, those defenses are defenses to a PRP's liability for cleanup costs. Section 122(e)(6) prohibits PRPs from initiating a remedial action without EPA permission.

The term "potentially responsible" carries particular weight in this context because Congress, when drafting CERCLA, sometimes used the term "responsible party," *see e.g.*, *id.* §§ 9601(39)(D)(ii)(bb), 9604(a)(1), and sometimes used the term "potentially responsible party, *see e.g.*, *id.* §§ 9604(a)(1), 9605(h)(4). In other words, it appears that Congress did not intend to add a requirement that a landowner actually be held liable before section 112(e)(6), 42 U.S.C. § 9612(e)(6), applied. Even if a person ultimately is not liable under CERCLA, that person still may fall into the category of "potentially" liable parties.

The District Court failed to undertake the proper statutory analysis by focusing on whether the landowners were "*potentially* responsible parties." The District Court likewise failed to assess whether any of the 98 landowners qualified as a protected "third party" or "innocent landowner" under the statutory definitions. Thus, the District Court's conclusion that all 98 landowners are not subject to the requirements of CERCLA section 122(e)(6) is fatally flawed.

The United States takes no position as to the ultimate issues of fact to be considered in weighing whether any of the landowners qualify as protected third

parties or innocent landowners. If this Court agrees that section 113(h) prohibits the state restoration-damages claim as a matter of law, it need not address section 122(e)(6). EPA is unlikely to approve the cleanup proposed by the landowners because that approach is inconsistent with EPA's RODs for the reasons discussed in sections I-A, I-B, and II of this brief. Such a tentative proposal is not a proper basis for a damages award.

CONCLUSION

For the foregoing reasons, this Court lacks jurisdiction over, and should dismiss, the landowners' claim for restoration damages.

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CERTIFICATE OF SERVICE

I certify that, on this 15th day of November 2016, a copy of the foregoing document was served by first-class mail to counsel of record for each of the parties, as set forth below.

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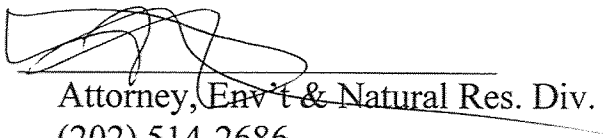

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CERTIFICATE OF COMPLIANCE

The foregoing brief uses a monospaced Times New Roman 14 point typeface. According to the Microsoft Word text counting function, this brief contains 7,487 words. This brief exceeds the 5,000 word limit for amicus briefs set by Rule 11(4) of the Montana Rules of Appellate Procedure, and is accompanied by a Motion to File an Over-Length Amicus Brief.

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